

ENTERED

June 01, 2017

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISIONIDA RODRIGUEZ, *et al*,

Plaintiffs,

VS.

ALLSTATE TEXAS LLOYDS,

Defendant.

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CIVIL ACTION NO. 7:16-CV-00498

ORDER

The Court now considers Allstate Texas Lloyds' ("Defendant") motion to dismiss for want of prosecution,¹ to which Ida and Daniel Rodriguez ("Plaintiffs") never responded. After duly considering the record and authorities, the Court **GRANTS** the motion.

I. BACKGROUND

This is a hail/insurance case arising from a storm which allegedly damaged Plaintiffs' property.² Plaintiffs were not satisfied with their insurance payout, and thereafter filed suit against Defendant in state court.³ Defendant removed the case, which was originally assigned to Judge Hinojosa, but then reassigned to this Court when Judge Hinojosa recused himself.⁴ Plaintiff filed a motion to remand,⁵ which the Court denied.⁶

Plaintiffs' original counsel, Peter Ferraro, was given permission to withdraw from the case.⁷ Kent Livesay and William McCarthy continued to represent Plaintiffs, but later, Mr.

¹ Dkt. No. 24.

² Dkt. No. 1-5 p. 3.

³ Dkt. No. 1-5.

⁴ Dkt. No. 2.

⁵ Dkt. No. 6.

⁶ Dkt. No. 12.

⁷ Dkt. No. 11.

Livesay moved to withdraw because his license to practice law was suspended.⁸ Mr. Livesay's motion to withdraw was granted,⁹ leaving only Mr. McCarthy as Plaintiffs' counsel. Subsequently, Mr. McCarthy moved to withdraw as counsel,¹⁰ and the Court granted the motion orally. The legal assistant assigned to Plaintiffs' case submitted an affidavit stating that Plaintiffs did not wish to pursue their legal claims any further and that they would not attend the hearing on Mr. McCarthy's motion to withdraw.¹¹

Defendant filed the instant motion to dismiss for want of prosecution, which is now ripe.¹² The Court now turns to its analysis.

II. DISCUSSION

Federal Rule of Civil Procedure 41(b) provides for dismissal for want of prosecution, and clarifies that such dismissals operate as adjudications on the merits, meaning such dismissals are with prejudice. Dismissal for want of prosecution has two elements: "(1) there is a clear record of delay or contumacious conduct by the plaintiff, and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile."¹³ Generally, at least one of three aggravating factors should also be present to permit an involuntary dismissal under Rule 41(b): "(1) plaintiff caused the delay himself, (2) actual prejudice to the defendant, and/or (3) intentional conduct caused the delay."¹⁴

Dismissal for want of prosecution is proper here. Plaintiffs have stalled litigation, and anything less than dismissal would be futile because it would not prompt diligent prosecution.

⁸ Dkt. No. 17.

⁹ Dkt. No. 18.

¹⁰ Dkt. No. 19.

¹¹ Dkt. No. 23.

¹² Dkt. No. 24.

¹³ *Tello v. Comm'r*, 410 F.3d 743, 735 (5th Cir. 2005).

¹⁴ *Id.* pp. 735–36.

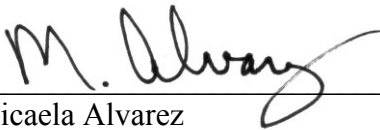
The only meaningful litigation in this case consists of a motion for remand,¹⁵ the withdrawal of all of Plaintiffs' counsel, and the appraisal by Plaintiffs' counsel that Plaintiffs do not want to prosecute the case.¹⁶ Plaintiffs have thus delayed this proceeding by refusing to participate personally, failing to retain counsel, and indicating that they do not wish the case to proceed. This delay was caused by Plaintiffs themselves, not Plaintiffs' counsel, and anything less than dismissal would be futile.

III. HOLDING

Defendant's motion to dismiss is **GRANTED**. Plaintiffs' case is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DONE at McAllen, Texas, this 1st day of June, 2017.



Micaela Alvarez
United States District Judge

¹⁵ Dkt. No.12.

¹⁶ Dkt. No. 23.